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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. SHERMAN CUMMINGS, Defendant and Appellant.	C059599 (Super. Ct. Nos. 06F06314, 07F07024)

A jury convicted defendant Sherman Cummings of grand theft from a person, simple assault, misdemeanor battery, and making a criminal threat. (Pen. Code, §§ 487, subd. (c), 240, 242, 422.) The jury acquitted him of robbery and aggravated assault. (Pen. Code, §§ 211, 245, subd. (a)(1).) The trial court sentenced defendant to prison for a total of three years. Defendant timely filed this appeal.

Defendant contends the trial court should not have allowed the People to introduce evidence of a prior assault he committed against the current victim's husband. We shall conclude the trial court properly admitted this evidence. Defendant also contends—and the Attorney General concedes—that the battery conviction must be reversed because it was not a charged offense

or necessarily included within a charged offense. We agree. We shall reverse the battery conviction, modify the sentence, and otherwise affirm the judgment.

BACKGROUND

The victim, Delores Sears, lived about four blocks from George's Market. She lived with Ervin Miller, whom she had been with since about 2003, and she was now married to him. She testified that at about 9:30 p.m., on July 18, 2007, she walked her dog toward George's Market. She had had a sexual relationship with defendant, but testified it ended over a year before. As she walked to the market, defendant ran up to her, talking crazy. He said "he was going to get his hoes to kick my ass." He grabbed a bag she was carrying that had three dollars in it, and ran towards the market. She was scared. As she walked back home, defendant caught up with her and asked her to go to his house because he wanted her dog to mate with his dog. He also told her he would "kill me and my dog." He grabbed her and began to choke her so she could not scream. At one point he kicked her dog, and when it became aggressive, he walked off, fast.

Sears testified she knew that defendant had assaulted her husband Miller the year before this incident, and had seen Miller's injuries; this knowledge affected her during the current incident. Sears had a misdemeanor burglary conviction.

When police arrived, Sears was upset and crying. She reported pain, and had redness around her neck. She told an officer that defendant first made a threat to her as she ran

through her front door. Miller testified that Sears came home crying and upset. Miller had two convictions reflecting moral turpitude.

Miller testified that on July 19, 2006, as he was riding his bike to George's Market, defendant jumped out and hit him in the face twice, cutting his cheek, and he still bore scars, which he showed to the jury. A police officer testified that Miller had "fairly" deep lacerations from his chin to his ear, and bruising under his eye, as a result of the 2006 incident. Defendant pled guilty to assault and was granted probation, with conditions that he serve 120 days in jail and not come within 100 feet of Sears and Miller's house.

In count one, the jury acquitted defendant of robbery but convicted him of grand theft from a person. In count two, the jury acquitted defendant of aggravated assault, but convicted him of assault and battery. In count three, the jury convicted defendant of making a criminal threat.

Based on the verdicts, the trial court found defendant violated his probation in a prior case (Sacramento County Superior Court No. 06F06314), in which defendant pled guilty to aggravated assault (Pen. Code, § 245, subd. (a)(1)) stemming from his 2006 attack on Miller

The trial court sentenced defendant to a total of three years in prison, as we describe in more detail later in this opinion. Defendant timely appealed.

DISCUSSION

I.

Defendant contends the trial court improperly allowed the prosecutor to introduce evidence of the 2006 assault on Miller

The People filed an in limine motion regarding the uncharged offense. The People argued the assault on Miller would show intent and motive, because defendant was jealous of Sears's relationship with Miller, a White man. Further, because Sears knew about defendant's assault on Miller, the evidence would tend to show that Sears was genuinely and reasonably in fear.

Sears's fear was relevant to two offenses. The robbery charge required the People to prove, in part, that defendant took property "by force or fear." (Pen. Code, § 211; see *People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1319.) The criminal threat charge required the People to prove, in part, that defendant's threat caused Sears "reasonably to be in sustained fear for . . . her own safety or for . . . her immediate family's safety[.]" (Pen. Code, § 422; see *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1139-1141.) Thus, evidence that she was actually aware of defendant's ability to inflict serious injury, as he had done to her husband the year before, would be probative of her fear of defendant, both to show that she relinquished money to him out of fear and to show that she

actually and reasonably was placed in "sustained fear" by his threatening words.[1]

The trial court ruled the evidence was admissible and was not more prejudicial than probative. The trial court stated that, in addition to showing the relationships of the parties, the evidence could be used to show motive and intent, and could be used by the defense to show a motive on the part of Sears to lie.

The trial court did not explicitly state whether or not the evidence could be used to show fear for purposes of robbery. However, the limiting instruction read to the jury, CALCRIM No. 375, stated in part that the evidence could be used "for the limited purpose of deciding whether or not the defendant acted with the intent to communicate a threat, that his statement be understood as a threat in this case, or the defendant had a motive to commit the offenses alleged in this case. [¶] Do not consider this evidence for any other purposes except for the limited purpose of intent and motive."

On appeal, defendant contends the evidence of his 2006 assault on Miller was inadmissible to show intent, motive, or Sears's fear, in the 2007 incident, and it was more prejudicial than probative. We disagree with these contentions.

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[1] The fact that defendant was later acquitted of these two charges is not relevant. As a general rule, a trial court's determination must be evaluated based on the circumstances known to the court at the time of the ruling. (See, e.g., *People v. Jenkins* (2000) 22 Cal.4th 900, 1009 ["The court was well within its discretion in denying the motion to exclude this evidence pursuant to Evidence Code section 352, considering the facts before it at the time of the motion"].)

The evidence was admissible for all three of the challenged reasons.

As for intent, defendant concedes that "[t]he least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402 (*Ewoldt*).) However, citing *People v. Balcom* (1994) 7 Cal.4th 414 (*Balcom*), he argues "regardless of the similarity of uncharged and charged acts, uncharged acts may not be admitted to prove intent where—if the jury believes the prosecutor's theory of events—it must necessarily believe that the defendant acted with the requisite intent."

Balcom explained its holding succinctly as follows:

"The victim testified that defendant placed a gun to her head and forced her to engage in sexual intercourse. Defendant conceded that he engaged in sexual intercourse with the victim but denied that he used a gun or otherwise accomplished such intercourse against the victim's will, claiming she voluntarily consented. [¶] These wholly divergent accounts create no middle ground from which the jury could conclude that defendant committed the proscribed act of engaging in sexual intercourse with the victim against her will by holding a gun to her head, but lacked criminal intent because, for example, he honestly and reasonably, but mistakenly, believed she voluntarily had consented. [Citation.] On the evidence presented, the primary issue for the jury to determine was whether defendant forced the complaining witness to engage in sexual intercourse by placing a

gun to her head. No reasonable juror considering this evidence could have concluded that defendant committed the acts alleged by the complaining witness, but lacked the requisite intent to commit rape." (*Balcom*, *supra*, 7 Cal.4th at p. 422.) *Balcom* acknowledged that defendant's not guilty plea "put in issue all of the elements of the offenses, including his intent [citation], and evidence that defendant committed uncharged similar offenses would have some relevance regarding defendant's intent in the present case. But, because the victim's testimony that defendant placed a gun to her head, if believed, constitutes compelling evidence of defendant's intent, evidence of defendant's uncharged similar offenses would be merely cumulative on this issue." (*Id.* at pp. 422-423.)

Defendant contends: "The prosecutor's theory of the present case was that [defendant] choked and threatened [Sears], and robbed her of a plastic bag which contained three dollars. The defense theory was that [Sears] was simply lying—that she made up the attack, had not been choked or robbed, and had not been threatened. Just as in *Balcom*, the jury could not have believed the prosecutor's version of events without also finding [defendant] had the requisite intent." We do not agree with this contention.

As stated, the limiting instruction in part allowed the jury to use the evidence as it related to the criminal threat charge (Pen. Code, § 422), that is, "for the limited purpose of deciding whether or not the defendant acted with the intent to communicate a threat," and "that his statement be understood as

a threat[.]" The jury could have found, factually, that defendant made the statements Sears described in her testimony, while also finding that defendant lacked the intent to communicate a threat, that is, that he meant the words in jest, or that he said them as part of an angry outburst, rather than "with the specific intent to be taken as a threat." (*People v. Felix* (2001) 92 Cal.App.4th 905, 911.) Thus, the evidence was relevant to show that he intended his statements to "be understood as" threats, one of the elements the jury was required to find as to this charge (CALCRIM No. 1300). (See *People v. Garrett* (1994) 30 Cal.App.4th 962, 967 (*Garrett*) [fact victim knew Garrett had killed someone was admissible to show he had intent that threat be taken seriously].) The evidence was not cumulative to other evidence on this point. (Cf. *Balcom*, *supra*, 7 Cal.4th at pp. 422-423.)

As for motive, "the probativeness of other-crimes evidence on the issue of motive does not necessarily depend on similarities between the charged and uncharged crimes, so long as the offenses have a direct logical nexus." (*People v. Demetrulias* (2006) 39 Cal.4th 1, 15.) It was reasonable to infer that defendant attacked Miller in the past, and attacked Sears in the current offense, because of jealousy or anger lingering from his prior sexual relationship with Sears. It is true, as defendant points out, that he made no statements in either incident that explicitly revealed his motive. However, evidence of what a person is thinking "is almost inevitably circumstantial," (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208)

and "'courts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred.'" (*United States v. Williams* (2008) 553 U.S. 285 [170 L.Ed.2d 650, 671]; see *People v. Johnson* (1901) 131 Cal. 511, 514.)

In this case, the circumstances show that Sears used to have a sexual relationship with defendant, but is married to Miller, that defendant slashed Miller's face a year before, and in this incident threatened and choked Sears. From these circumstances, one can rationally infer that defendant attacked Sears because he was jealous or angry. Further, in the current incident defendant threatened to have prostitutes attack Sears, and he wanted his dog to mate with her dog. These two sexually-charged comments could rationally be used to bolster the claim that defendant harbored lingering sexual interest in Sears, and a corresponding anger towards her for rejecting him, providing a clear motive for his attack on her.

Defendant cites authority for the proposition that prior crimes evidence should be excluded "where motive [is] not seriously contested[.]" But the case defendant cites states such evidence should be excluded where it "is highly prejudicial, yet has only marginal relevance to a fact (motive) which was not seriously contested, and has virtually no tendency to prove that fact." (*People v. Bigelow* (1984) 37 Cal.3d 731, 748.) In this case the evidence had a solid tendency to prove jealousy, and motive was not uncontested. Defendant argues the

evidence was not admissible to show motive in this case because if the jury believed Sears's testimony about the current incident, the jury would necessarily infer the motive of jealousy; "[I]n fact, the motive for the crimes was so obvious that the prosecutor did not even bother alluding to it in her closing statements." We disagree. The prosecutor could not know what quantum of evidence would persuade the jury on this point, and evidence that defendant had attacked Miller in the past would bolster the theory of jealousy. It was not cumulative. (Cf. *Balcom*, *supra*, 7 Cal.4th at pp. 422-423.)

Defendant argues the evidence was not admissible to show Sears's fear of defendant. Again he argues that if the jury believed defendant said he would kill Sears and her dog, "they would necessarily believe that she had a good reason to be afraid of him." We disagree, because, as stated above, the evidence was not cumulative and Sears's knowledge of what defendant had done to her husband was directly probative of the genuineness and reasonableness of her fear. (See, e.g., *People v. Solis* (1985) 172 Cal.App.3d 877, 886 [rape victim's knowledge that Solis had killed his own brother admissible to show victim's fear of Solis, overcoming her will to resist rape]; *Garrett*, *supra*, 30 Cal.App.4th at p. 967 (*Garrett*) [fact victim knew Garrett had killed someone admissible to show victim was in sustained fear and that fear was reasonable]; accord *People v. Gaut* (2002) 95 Cal.App.4th 1425, 1430-1432 [sufficiency of the evidence challenge; Gaut made threats from prison, fact victim

knew of his prior acts of violence used to show reasonableness of victim's fear of threats].)

Finally, defendant argues the evidence was more prejudicial than probative. In making this argument he largely reweighs the factors and views them in favor of his contention. However, "[t]he trial court is vested with wide discretion in determining the admissibility of evidence. Its exercise of discretion under Evidence Code section 352 will not be disturbed on appeal absent a clear abuse, i.e., unless the prejudicial effect of the evidence clearly outweighs its probative value." *People v. Karis* (1988) 46 Cal.3d 612, 637 (*Karis*).)

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352,

"prejudicial" is not synonymous with "damaging."'" (*Karis*, *supra*, 46 Cal.3d at p. 638.)

In the specific context of uncharged act evidence, "The probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Kipp* (1998) 18 Cal.4th 349, 371.) In this case, the value of the uncharged act evidence was substantial, as we have explained above, and it was not "largely outweighed" by "a serious danger of undue prejudice, of confusing the issues, or of misleading the jury." (*Ibid.*)

The evidence of defendant's assault on Miller was not remote, time-consuming, or misleading. Miller testified about the 2006 attack and showed the jury his scar, an officer described Miller's injuries, and the jury learned of defendant's punishment. The testimony was not replete with "gory details" as defendant asserts. The fact the jury saw scars and heard testimony that defendant slashed Miller was not particularly inflammatory. The evidence was not of the kind that "uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." (*Karis*, *supra*, 46 Cal.3d at p. 638.)

Further, the jury learned that defendant had already been punished for that offense, therefore it is unlikely the jury would feel the need to punish defendant in this case because of his conduct in the prior case. (*People v. Ortiz* (2003) 109

Cal.App.4th 104, 118 ["defendant had been punished—via convictions—for the prior bad acts introduced before the jury, a circumstance courts have acknowledged lessens its prejudicial impact"]; cf. *Ewoldt*, *supra*, 7 Cal.4th at p. 405 [fact Ewoldt had not been punished increased possible prejudice].)

Defendant contends the fact the jury asked for a readback of Sears's testimony and acquitted defendant on some counts shows "this case was quite close." We draw a different inference from those circumstances: The fact the jury wanted to review Sears's testimony, and ultimately *acquitted* defendant of the robbery and aggravated assault charges shows that the jury was not inflamed against defendant, but took its job seriously and properly gave the defendant the benefit of doubts it had about what he did.

We conclude the trial court properly admitted the evidence of defendant's prior assault on Miller

II.

Defendant contends—and the Attorney General concedes—that the battery conviction must be reversed because it was not a charged offense and was not necessarily included within any charged offense. We agree.

Defendant was not charged with battery. He was charged with assault by means likely to cause great bodily injury. (Pen. Code, § 245, subd. (a)(1).) As we shall explain, battery is not a lesser included offense of aggravated assault.

Two tests are applied "in determining whether an uncharged offense is necessarily included within a charged offense: the

'elements' test and the 'accusatory pleading' test. Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former. Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former." (*People v. Reed* (2006) 38 Cal.4th 1224, 1227-1228 (*Reed*).)[2]

As for the elements test, battery requires as one of its elements a completed touching. (Pen. Code, § 242; see *People Mansfield* (1988) 200 Cal.App.3d 82, 87-88.) Defendant was charged with aggravated assault, specifically, assault by means likely to cause great bodily injury. (Pen. Code, § 245, subd. (a)(1).) This offense can be committed without touching a person. "Where the assault is committed with a deadly weapon, or with force likely to produce great bodily injury, the aggravated assault is complete upon the attempted use of the force. If halted at this point, no battery has been committed." (*People v. Yates* (1977) 66 Cal.App.3d 874, 878; see *In re Robert G.* (1982) 31 Cal.3d 437, 441; *People v. Jones* (1981) 119 Cal.App.3d 749, 754.)

As for the accusatory pleading test, the information alleged the aggravated assault in the terms of the statute, and did not allege a touching.

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[2] In contrast, if the issue is whether a defendant can be convicted of *multiple charged offenses* based on one act or course of conduct, the "accusatory pleading" test is not used, and the issue is resolved solely by application of the "elements" test. (*Reed*, *supra*, 38 Cal.4th at p. 1231.)

Accordingly, as the Attorney General concedes, defendant was improperly convicted of battery, an offense neither charged in the information nor included within a charged offense. Accordingly, the battery conviction must be reversed.

III.

In reviewing the effect of the reversal of the battery conviction on the judgment, we discovered a sentencing problem overlooked by the parties.[3]

Defendant contends the trial court imposed a three year sentence for simple assault (Pen. Code, § 240) and contends a corrected abstract—not in the record on appeal—was prepared to show that this sentence was stayed pursuant to Penal Code section 654. The Attorney General states that because a "stayed" sentence of three years was imposed for "simple" assault, all that needs to be done is to reverse the battery conviction, and no further correction is needed.

The abstract of judgment and minutes of sentencing both state that the trial court imposed a concurrent three year sentence for assault, and both omit reference to the battery. However, the reporter's transcript shows the trial court did not impose any sentence for either assault or battery, it stayed "imposition" of sentence for the "misdemeanor offenses in Count Two," in order to implement Penal Code section 654.

Thus, the record reflects two separate errors.

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[3] This problem was not briefed by the parties. However, because our resolution of this problem seems noncontroversial, we proceed without soliciting supplemental briefing. Any party claiming to be aggrieved may invoke the remedy provided by statute. (Gov. Code, § 68081.)

First, the abstract and the minutes of sentencing were not properly prepared. Those documents must accurately reflect the sentence imposed in open court by the trial judge. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385-389; see *People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Further, the *three year prison term* shown on those documents could not be correct, because the punishment for simple assault cannot exceed six months in jail and a fine. (See Pen. Code, § 241, subd. (a).)

Second, to properly implement Penal Code section 654, the trial court should have imposed sentences for the misdemeanor battery and assault convictions, and then stayed execution of those sentences. (*People v. Pearson* (1986) 42 Cal.3d 351, 359-360; see *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1128-1129.)

Because we reverse the battery conviction, no further action needs to be taken regarding the sentence therefor. As for the assault conviction, rather than requiring the expense of transporting defendant from prison to attend a hearing to determine a misdemeanor sentence that must then be stayed, we will instead exercise our authority to modify the judgment. (Pen. Code, § 1260.) We shall impose a six-month sentence for the assault, and stay execution of that sentence pursuant to Penal Code section 654.[4]

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[4] The recent amendments to Penal Code section 4019 do not entitle defendant to additional time credits, because he was convicted in this case of a serious felony. (Pen. Code, § 4019, subds. (b) & (c); Stats. 2009, 3d Ex. Sess., ch. 28, § 50.) His conviction for criminal threats qualifies as a "serious" felony. (Pen. Code, §§ 422, 1192.7, subd. (c)(38).)

DISPOSITION

The battery conviction is reversed, and the judgment is modified by imposing a six-month sentence for the misdemeanor assault conviction. Execution of that sentence is stayed (Pen. Code, § 654). In all other respects, the judgment is affirmed. The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation a new abstract of judgment.

SIMS, Acting P. J.

We concur:

HULL, J.

CANTIL-SAKAUYE, J.